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No. 83-1310

In The
Supreme Court of the United States
October Term, 1983

EDWARD T. YOUNG, JR., et al.,
Petitioners,

vs.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Pages
TABLE OF AUTHORITIES	i
CONSTITUTIONAL AND STATUTORY PROVISIONS	iv
SUMMARY OF THE ARGUMENT	1
ARGUMENT:	
I. A court-made change in state law which abolishes private ownership of property constitutes a "taking" prohibited by the federal constitution.	2
II. Petitioners' view is consistent with long settled legal expectations established under federal and Colorado law.	5
A. Federal legislative and judicial authorities establish that patents to land from the federal government conveyed nontributary ground water as part of the land in which such water was found.	5
B. *Whitten v. Coit* unequivocally confirmed as Colorado law that ownership of nontributary ground water is vested in the overlying landowner.	10
III. The *Huston* decision violates the Contract Clause.	9
IV. The *Huston* decision has unconstitutionally taken from the United States government the nontributary ground water underlying federal land.	10
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:

Andrus v. Charlestone Stone Products Company, 436 U.S. 604 (1978)	6
Baeth v. Hoisveen, 157 N.W.2d 728 (N.D. 1968)	3

TABLE OF AUTHORITIES—Continued

Pages

Baumann v. Smrha, 145 F.Supp. 617 (D. Kan.), aff'd, 352 U.S. 863 (1956) ——— 3, 4

Bonelli Cattle Co. v. State, 414 U.S. 313 (1973), rev'd, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) ——— 2, 10

Comstock v. Ramsay, 55 Colo. 244, 133 P. 1107 (1913) ——— 7

Douglass v. Pike County, 101 U.S. 677 (1879) ——— 9

Hughes v. State, 389 U.S. 290 (1967) ——— 1, 4, 10

Munn v. State, 94 U.S. 113 (1876) ——— 2

Safranek v. Town of Limon, 123 Colo. 330, 228 P.2d 975 (1951) ——— 8

State v. Southwestern Colorado Water Conservancy District, 671 P.2d 1294 (Colo. 1983) ("Huston") ——— 1, 2, 5, 6, 7, 9, 10

Stonewall Estates v. CF&I Steel Corp., 197 Colo. 255, 592 P.2d 1318 (1979) ——— 8

Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 638 P.2d 1324 (1981), appeal dismissed, 457 U.S. 1101 (1982) ——— 3

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) ——— 6

United States v. Union Pacific Railroad Co., 353 U.S. 112 (1957) ——— 5

Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (1963) ——— 1, 4, 7, 8, 10

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. V ——— 4

U.S. CONST. amend. XIV, sec. 1 ——— 4

TABLE OF AUTHORITIES—Continued

	Pages
U.S. CONST. art. I, sec. 10	9
COLO. CONST. art. XVI, sec. 5	7
STATUTES:	
Act of July 26, 1866, ch. 262, sec. 9, 14 Stat. 251, 253 (codified at 30 U.S.C. § 51)	6
Act of July 9, 1870, ch. 235, sec. 17, 16 Stat. 217, 218 (codified at 30 U.S.C. § 52)	6
Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321-29)	6
Colo. Rev. Stat. 37-82-101(1)	9
Colo. Rev. Stat. 37-90-103(6)	8
Colo. Rev. Stat. 37-90-137	8
Colo. Rev. Stat. 37-90-137(4)	9

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are cited in the Table of Authorities, *supra*. The text of such provisions is reproduced in the Appendices of the Petition and of the State's Brief in Opposition thereto.

SUMMARY OF THE ARGUMENT

The essence of the State's Brief in Opposition is set forth in a single sentence at page 2:

> Numerous decisions of this Court have held that a state may change common law rules with respect to use and control of underground water, and such a change does not effect a taking of private property without just compensation.

Every case cited by the State in support of its position is inapplicable for one or both of the following reasons:

(1) The right at issue was a right to use *publici juris* water as contrasted with a vested property right;

(2) The court specifically found that there had not been a change in the state's water law doctrines.

In contrast to the law in other jurisdictions where riparian rights, surface water rights, or rights to the use of percolating or other forms of ground water are usufructuary in nature, in Colorado nontributary ground water is vested private property, not an inchoate right dependent upon capture or use. *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963). Unlike courts in some of the jurisdictions cited by the State which followed previously determined rules of property law, the Colorado Court in *State v. Southwestern Colorado Water Conservancy District (Huston)*, 671 P.2d 1294 (Colo. 1983), openly repudiated its former property doctrine.

The impact of the doctrinal change effected by the *Huston* decision upon Petitioners' ownership interests in nontributary ground water is indistinguishable from the taking of tidelands property resulting from the Washington Supreme Court's decision in *Hughes v. State*, 389 U.S. 290 (1967). Each case created the same result, "effecting a retroactive transformation of private into public property—without paying for the privilege of doing so." 389 U.S. at 297. The constitutional prohibition against

that result is no less valid today than it was when Mr. Justice Stewart first enunciated his warning, nor than it was in 1973 when this Court in *Bonelli Cattle Co. v. State*, 414 U.S. 313, 331, confirmed its constitutional concern, adopting Mr. Justice Stewart's very words.

ARGUMENT

I. A Court-Made Change In State Law Which Abolishes Private Ownership Of Property Constitutes a "Taking" Prohibited By The Federal Constitution

The State contends that "the power of the state to replace rules of common law with statutory or decisional doctrines better suited to changing conditions and the public interest cannot . . . be denied." Brief in Opposition, at 4. Such contention is incorrect insofar as it is taken to imply that states' actions in reversing former decisions and embracing new property law doctrines are somehow immune from the federal constitutional constraint that private property cannot be taken for public use without just compensation. *See Munn v. State*, 94 U.S. 113, 134 (1876) ("Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed . . . unless prevented by constitutional limitations.") The new property ownership doctrine articulated by the Colorado Supreme Court in *Huston*, which retroactively transformed privately owned nontributary ground water into public property, clearly transcends the bounds of permissible changes in state decisional doctrines and violates the federal constitutional prohibition against the taking of private property without compensation.

The cases from other jurisdictions cited by the State as exemplifying instances where states have chosen to apply the appropriation doctrine to ground water as well as to

surface water, *see* Brief in Opposition, at 4-5, involved no attempt by a court or legislature to modify vested property rights in water. Those cases concerned a state's substitution of the doctrine of prior appropriation for common law rules by which right to the *use* of water—but no proprietary interest in the corpus of the water itself prior to use—had been recognized. Under such circumstances, there was no ownership of the unused water underlying a landowner's property which could have been affected by the state's substitution of water rights doctrines.

In *Baeth v. Hoisveen*, 157 N.W.2d 728 (N.D. 1968), for example, landowners brought a declaratory judgment action asking that the state ground water act be construed so as not to interfere with their rights to the tributary water underlying their lands. The Court responded:

> [T]here is no absolute ownership of ground water underlying that land which has not actually been diverted and applied to a beneficial use.
>
> • • •
>
> Because the "vested right" which the Plaintiff in the instant case claims is, in reality, a usufructuary right, and its existence is contingent upon application of the underlying water to beneficial use, the legislative exercise of power embodied in Section 61-01-01, N.D.C.C., does not "expropriate" any "vested right" of the plaintiff.

157 N.W.2d at 731-33.

At page 5 of its Brief in Opposition, the State cites *Baumann v. Smrha*, 145 F. Supp. 617 (D. Kan.), *aff'd*, 352 U.S. 863 (1956), suggesting that this Court had sanctioned a clear overruling of previous property doctrines in spite of a resulting deprivation of property. *Baumann* is inapposite on two grounds:

(1) That case did not involve vested property rights. The Court stated:

> [W]e do not regard a landowner as having a vested right in underground waters underlying his land which he has not appropriated and applied to beneficial use.

145 F. Supp. at 624-25. The Court specificially declared that any change in state law could not impair existing vested rights. *Id.*

(2) The federal court in *Baumann* merely followed the Kansas Court's latest pronouncement without finding, as the State suggests, that it had changed the previous law. Noting that the Kansas Court's latest decision would have the effect of overruling earlier cases, the *Baumann* Court declared its intent to follow that decision. "Whether such a change in the law of Kansas is contrary to earlier decisions of the Supreme Court of Kansas . . . .", 145 F. Supp. at 625, was an issue which the Court did not resolve.

The property *ownership* pronouncement in *Whitten* concerning nontributary ground water in Colorado stands in sharp contrast to the state law involved in the above cases, under which only inchoate rights to the *use* of particular waters were recognized.

> The landowner has *property* in the *water in his soil.* It is a vested right which cannot be taken away by mere legislation.

153 Colo. at 173-74, 385 P.2d at 140 (emphasis added). The landowner's proprietary interest in the corpus of underlying nontributary ground water in Colorado is absolutely vested by virtue of overlying land ownership, and is not dependent upon or limited by application of the water to beneficial use. As such, Petitioners' ownership interests in nontributary ground water, akin to the interests in accreted lands of owners of oceanfront property involved in *Hughes v. State,* are protected against taking by the fifth and fourteenth amendemnts to the federal constitution. The State's attempted analogy to permissible changes

in state law impacting non-vested, inchoate rights to *use* certain waters fails to legitimize the clear taking which has resulted from the Colorado Supreme Court's Opinion in *Huston*, effecting a retroactive transformation of private property into public property.

II. Petitioners' View Is Consistent With Long Settled Legal Expectations Established Under Federal And Colorado Law.

A. Federal legislative and judicial authorities establish that patents to land from the federal government conveyed nontributary ground water as part of the land in which such water was found.

It is the established rule that grants from the federal government are construed in favor of the government, that "nothing passes except what is conveyed in clear language", and that "if there are doubts they are resolved for the [g]overnment, not against it." *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 116 (1957). The State has failed to demonstrate any such clear expression of Congressional intent that the United States has separated the title to its nontributary ground water from that of its land.

In reaching for language to support its position that nontributary ground water was severed from the realty when the latter was patented to private parties, the State relies upon a sentence from the voluminous Congressional Record regarding the McCarran Amendment, that "the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof." Brief in Opposition, at 8. The sentence quoted by the State, which appears on page 121 of the Senate Report, is the only place in the very extensive Congressional Record on the McCarran Amendment that we find any reference to water beneath

the surface of the ground, and necessarily relates to tributary ground water since every other reference to water in the reports and testimony is to the adjudication of the waters of surface streams and the obligation of the United States to participate therein the same as any other appropriator.

The State also attempts to make *Andrus v. Charlestone Stone Products Company*, 436 U.S. 604 (1978), pertinent to a determination of the property status of nontributary ground water in Colorado. Brief in Opposition, at 9. The *Andrus* case involved the sole issue of "whether water [was] a 'valuable mineral' as those words were used in the Mining Law." 436 U.S. at 605. Any pronouncement of the *Andrus* court was *obiter dictum* with respect to the issues here involved. Moreover, the policy considerations weighing against a conclusion that ground water could be claimed under the mining laws — the problems which would arise from the fact of having two overlapping systems for the acquisition of private water rights — are of no relevance here, where federal and Colorado laws are entirely consistent in recognizing the landowner's ownership of the nontributary ground water beneath his property.

The early Congressional Acts relied upon by the Colorado Supreme Court in *Huston* and cited by the State as effecting a severance of nontributary ground water from the land refer only to waters in or tributary to natural surface streams. *See* Petiton for Writ of Certiorari, at 10-11. At the time of the enactment of the Acts of 1866, 1870 and 1877, deep nontributary aquifers were not recognized as a viable source of water supply. In view of the actual language chosen by Congress in the subject Acts, the recognized rule that Congressional legislation must be interpreted in the light of then existing facts, *see United*

States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690, 706 (1898), and the rule that nothing passes from the federal government except that which is conveyed in clear language, it can only be concluded that the title of the United States to the nontributary ground water underlying the public domain was not the subject of, or diminished by, the Acts of Congress concerning waters in or tributary to natural surface streams.

B. Whitten v. Coit unequivocally confirmed as Colorado law that ownership of nontributary ground water is vested in the overlying landowner.

The Colorado Supreme Court's attempt in *Huston* to dismiss the definitive property ownership pronouncement in *Whitten* as mere *dictum* is understandable, in view of its controlling effect upon the federal constitutional issues here involved. As evidenced in the State's Brief at pages 13-14, however, such position is untenable: While conceding that *Whitten* concerned the question of whether certain nontributary ground water was subject to appropriation, the State contends that the issue of private versus public ownership of such water was irrelevant to the Court's holding. The very basis for the holding was that such water could not be appropriated out of Colorado's constitutionally defined "water of every natural stream . . . dedicated to the use of the people of the state" because it was privately owned. *See* COLO. CONST. art. XVI, sec. 5.

Nor is the State's attempt to sweep *Whitten* under the rug, by citation to judicial and legislative authorities from years prior or subsequent to *Whitten*, successful. Colorado cases decided in years preceding *Whitten* and concerning other than nontributary ground water, *see, e.g., Comstock v. Ramsay*, 55 Colo. 244, 133 P. 1107 (1913);

Safranek v. Town of Limon, 123 Colo. 330, 228 P.2d 975 (1951); *see generally* Brief in Opposition, at 10-11, simply can not detract from the clear import of *Whitten*. In years subsequent to *Whitten*, the only decisions concerning ownership of the nontributary ground water involved herein have recognized the law of ownership of such water consistent with the decision of *Whitten*. *See Stonewall Estates v. CF&I Steel Corp.*, 197 Colo. 255, 258, 592 P.2d 1318, 1320 (1979).

The State's contention that "[t]he Colorado General Assembly quickly rejected any notion that *Whitten* might have created a common law ownership right in the overlying landowner," Brief in Opposition, at 14, is similarly unpersuasive. The State refers to three provisions of Colorado water statutes in support of its position. The State's discussion of section 37-90-103(6) fails to disclose that the present definition of "designated ground water" does "not include any ground water within the Dawson-Arkose, Denver, Arapahoe, or Laramie-Fox Hills formation located outside the boundaries of any designated ground water basin that was in existence on January 1, 1983." C.R.S. 37-90-103(6) (as amended, L.1983, p.1414, §1). The practical effect of such language is to exempt from the modified appropriation doctrine established under the 1965 Act the major nontributary formations which might intersect the designated basins.[1]

The State also points out that C.R.S. 37-90-137, as amended, requires a permit to construct a well outside the boundaries of designated ground water basins, and provides protection for existing users of such water while "limiting the class of persons entitled to use [it]." Brief

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[1]No case has upheld the 1965 Ground Water Management Act against a challenge that it effects a taking of private property in violation of the federal constitution.

in Opposition, at 14. In so doing, the State again leaves undisclosed the critical fact — that the class of persons entitled to use nontributary water is limited to those who own the overlying land or have the consent of the overlying landowner. The statutory provision containing that limitation, C.R.S. 37-90-137(4), is the *only* declaration of the legislature directly controlling the Petitioners' nontributary water. That provision supports, rather than refutes, their claim of ownership.

Finally, the State references C.R.S. 37-82-101(1) (Supp. 1983). Brief in Opposition, at 15. This provision clearly leaves the property right in nontributary water in the overlying landowner until he releases such water from his dominion.

III. The Huston Decision Violates The Contract Clause.

In *Douglass v. Pike County,* 101 U.S. 677, 687 (1879), this Court stated the well recognized rule that:

> After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.

As Petitioners have previously shown, the Opinion of the Colorado Supreme Court in *Huston* violates Article 1, Section 10 of the Constitution of the United States because it interprets the settled federal and state statutory scheme in an entirely new way, so as to destroy the landowner's right of ownership of underlying nontributary ground water which has been conveyed to purchasers of the overlying land. This novel construction impairs the very substance upon which purchasers and sellers have bargained with each other in contracts for the conveyance of land in Colorado.

IV. The Huston Decision Has Unconstitutionally Taken From The United States Government the Nontributary Ground Water Underlying Federal Land.

In Part IV of the State's Brief in Opposition, the State suggests that the United States must now resort to the federal reserved rights doctrine, with all its limitations, to acquire rights to use water, the title of which it has never relinquished. The State can show no action of the federal government by which it affirmatively divested itself of that property. Even if the various Acts relied upon by the State had severed the water from the land, subject to disposition by state law, *Whitten* declared that in Colorado the landowner owns the nontributary ground water underlying his property. That declaration was not limited to private citizens, but applies with equal force to the federal government. The Colorado Supreme Court's *Huston* decision has thus unconstitutionally taken vested rights of the United States government in the nontributary ground water underlying public domain lands in Colorado, forcing it to resort to the reserved rights doctrine to regain that property.

CONCLUSION

In the *Bonelli* case, this Court issued a warning, quoting the language of the *Hughes* concurrence, against a state's retroactive transformation of private into public property through changes in decisional property ownership doctrines. This case raises the same constitutional concerns more squarely than has any case in this decade. Review of this case by the Court, after thorough briefing and argument, is imperative in order to clarify the constitutional viability of the *Hughes* concurrence.

FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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